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No. 943

IN THE

SUPREME COURT OF THE UNITED STATES

AN EASEMENT AND RIGHT-OF-WAY 100 FEET WIDE AND 747 FEET LONG OVER CERTAIN LAND IN CUMBERLAND COUNTY, TENNESSEE, VADA SKAGGS, *Petitioner*,

v.

UNITED STATES OF AMERICA upon the relation and for the use of the TENNESSEE VALLEY AUTHORITY, *Respondent*

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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"It appearing to the Court that the complaint, order of possession. and the order appointing com-

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missioners have been entered in the above styled cause, it is hereby ordered, adjudged and decreed that the commissioners report its award to the court or to the clerk of the court within three months from this date." Signed Wm. E. Miller, Judge of the United States District Court," is in violation of Section 25, of the Tennessee Valley Authority Act, 16 U. S. C. p. 831X, which is in part as follows: "Either or both parties may file exceptions to the award of the commissioners within twenty days from the date of filing said award in court." ... 13

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v.

UNITED STATES OF AMERICA upon the relation and for the use of the TENNESSEE VALLEY AUTHORITY, *Respondent*

PETITION FOR WRIT OF CERTIORARI

FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States of America:

Your petitioner, Vada Skaggs, respectfully represents and prays that a writ of certiorari be issued to review a judgment of the United States District Court for the Middle District of Tennessee, Northeastern Division, entered in the above

styled cause on July 7, 1966, and affirmed by the United States Court of Appeals for the Sixth District, Cincinnati, Ohio, on November 17, 1967, from which this petition praying for writ of certiorari is made.

I

JURISDICTION

The jurisdiction of this Court is found in Title 28, U. S. Code, Section 1257(3) of the United States Code Annotated, Title 28, Rule 38, and Revised Rules of the Supreme Court of the United States, Rule 38.

(a) Both the United States District Court for the Middle District of Tennessee, and the United States Court of Appeals for the Sixth Circuit have decided the Federal statute, namely, the Tennessee Valley Authority Act, 16 U. S. C. p. 831X in a way probably in conflict with the applicable decisions of this Court.

(b) Both Courts have construed the Federal Rules of Civil Procedure in a way probably in conflict with the applicable decisions of this Court. See *Foreman* vs. *Davis*, decided December 3, 1962. reported in 371 U. S. 178.

II

CONSTITUTIONAL PROVISIONS INVOLVED

Article 5 of the Constitution of the United States of America provides the inhibition that private property cannot be taken for public use without just compensation.

III

QUESTIONS PRESENTED

1. Whether the order of William E. Miller, Judge of the United States District Court for the Middle District of Tennessee, Northeastern Division, dated September 25, 1965, is in violation of Section 25 of the Tennessee Valley Authority Act, which is in part as follows:

> "Either or both parties may file exceptions to the award of the commission within twenty days from the date of filing said award in court."

particularly when the Federal Statute provides (a) filing an award in court, (b) the order of the United States Court filing an award with either the court or the clerk, and (c) the award of the commission was filed only with the clerk of the court.

2. Whether the foregoing order of the court extends to the creation of a remedy in addition to that prescribed by the legislature.

3. Does the United States District Court have authority to enlarge the jurisdiction of the Tennessee Valley Authority Act.

4. Whether the lodging of the award by the commission with the clerk of the court is in violation of Section 25 of the Tennessee Valley Authority Act, 16 U. S. C. p. 831X.

5. Whether the Federal Rules of Civil Procedure are applicable to the Tennessee Valley Authority Act.

6. Whether the Federal Rules of Civil Procedure, Rules

6(b) and 6(e) Enlargement and Additional Time, three days after service by mail, applies to the case at Bar.

7. Whether the affidavits submitted by Dr. J. S. Skaggs and the appellant Vada Skaggs show excusable neglect in filing exceptions.

8. Are the statutes relied upon in the cases of *Robinson* v. *Celebreeze*, 237 F. Sup. 113; and *Ewing* v. *Risher*, 176 F. 2d (10th Cir. 1949) pari materia to Section 25 of the Tennessee Valley Authority Act, 15 U. S. C. p. 831X where the said statute provides "either or both parties may file exceptions to the award of the said commission within 20 days from the date of filing said award in court."

IV

STATEMENT OF FACTS

This is a condemnation proceeding by the United States of America under the Tennessee Valley Authority Act 1933 —48 Stat. 58, as amended, 16 U. S. C. p. 831dd, 1958 Supp. 11, (1958-60).

Pursuant to said cause the Tennessee Valley Authority commission filed its declaration of taking pursuant to the provisions of the Act, thereupon, about September 2nd 1961, Judge E. Miller, of the United States District Court of the Middle District of Tennessee, Northeastern Division, ordered that the Tennessee Valley Authority as agent of the United States of America be put in immediate possession.

After the complaint of the Tennessee Valley Authority was filed, the Declaration of Taking, and the order of possession. the commissioners were appointed to ascertain the value of

the easement sought to be acquired pursuant to 16 U. S. C. P. p. 831X.

The order of the commissioners setting the compensation for the property taken at $150.00 was lodged with the Clerk on November 15, 1961. A copy of said award was filed with the Clerk of the District Court of the United States for the Middle District of Tennessee, Northeastern Division, and after the filing the Clerk mailed a notice of the award to E. G. Tollett, at Crossville, Tennessee, then attorney for Vada Skaggs, whereupon Attorney Tollett sent by mail to Dr. J. S. Skaggs, at Charleston, West Virginia, the notice of the award, whereupon the correspondence in regard to the award was forwarded to Dr. J. S. Skaggs at his home at 215 Adair Boulevard, Knoxville, Tennessee.

Thereupon Vada Skaggs excepted to the award. The date of mailing the exceptions to the award was December 5, 1965, by mail, and received by the Clerk on December 6, 1965. The affidavit of Vada Skaggs and her husband Dr. J. S. Skaggs showed the reason why the exceptions to the award were not made sooner, and that the Federal Rules of Civil Procedure should be followed, particularly Rule 6(b), and also that they should have been allowed three days additional time for mailing as provided by Rule 6(e).

Thereupon Plaintiff filed its motion to strike defendant's exceptions to the award.

This cause was heard on this motion by the Judge of the United States District Court for the Middle District of Tennessee, Northeastern Division on March 28, 1966. The Court filed its memorandum on June 23, 1966, and on the 7th day of July, 1966, the court entered an order prepared by the attorney for the Appellee and approved by the Attorney for

the Appellant, and that the plaintiff's motion to strike defendant's exceptions was sustained and filed, and that the United States Court of Appeals for the Sixth Circuit affirmed the ruling of the United States District Court on November 17, 1967, and held that there was no merit in the appellant's contention, except that it was a final appealable order. (See decision, App. No. 1., p. 21).

V.

REASONS RELIED UPON FOR ALLOWANCE OF THIS WRIT

1. The order of the United States District Court for the Middle District of Tennessee, Northeastern Division, dated December 5, 1965, Vol. 7, page 564, provides as follows:

> "It appearing to the Court that the complaint, order of possession and the order appointing commissioners have been entered in the above styled cause, it is hereby ordered, adjudged and decreed that the commission report its award to the court or to the clerk of the court within three months from this date."
>
> Signed William E. Miller, Judge of the United States District Court

is in violation of Section 25 of the Tennessee Valley Authority Act, 16 U. S. C. p. 831X, which is in part as follows:

> "Either or both parties may file exceptions to the award of the commission within twenty days from the date of filing said award in court."

particularly in this respect (a) the Federal statute provides filing of the award only with the court, (b) the District Court's order ordered filing of the award with either the

court or the clerk of the court, and (c) the award was only filed with the clerk of the court.

2. That the decisions of the United States District Court and the United States Court of Appeals for the Sixth Circuit as to the construction of the Federal Rules of Civil Procedure are in conflict with the decisions of this Court.

3. Both the United States District Court for the Middle District of Tennessee, Northeastern Division, and the United States Court of Appeals for the Sixth Circuit have rendered decisions in conflict with the decisions of this Court and have decided the important question of local law in a way probably in conflict with applicable local decisions and have decided a Federal question in a way probably in conflict with the applicable decisions of this Court.

VI

Whether the lodging of the award by the commission with the Clerk of the Court is void and in violation of Section 25, Tennessee Valley Authority Act, 16 U. S. C. p. 831X.

VII

Whether the Federal Rule of Civil Procedure 6(b) and 6(e) are applicable.

VIII

Did the affidavits submitted by Dr. J. S. Skaggs and Vada Skaggs show excusable neglect in filing exceptions to the award?

Wherefore, the petitioner prays that this petition for writ of certiori be granted and that she may have such other and

further relief in the premises that may be proper and just.

Dated this the ....day of December, 1967.

AN EASEMENT AND RIGHT-OF-WAY 100 FEET WIDE AND 747 FEET LONG OVER CERTAIN LAND IN CUMBERLAND COUNTY, TENNESSEE, VADA SKAGGS

By W. HAYES PETTRY,
Counsel for Petitioner

No. .....

IN THE

SUPREME COURT OF THE UNITED STATES

AN EASEMENT AND RIGHT-OF-WAY 100 FEET WIDE AND 747 FEET LONG OVER CERTAIN LAND IN CUMBERLAND COUNTY, TENNESSEE,
VADA SKAGGS, *Petitioner,*

v.

UNITED STATES OF AMERICA, upon the relation and for the use of the TENNESSEE VALLEY AUTHORITY, *Respondent.*

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

OPINION OF THE COURT BELOW

The United States Court of Appeals for the Sixth Circuit affirmed the holding of the United States District Court for the Middle District of Tennessee, Northeastern Division, which will be found in Appendix 1.

II

JURISDICTION.

Jurisdiction has already been stated under Nos. I and II

of the foregoing petition for writ of certiori and for the sake of brevity will not be restated here.

III

QUESTIONS INVOLVED

The questions involved have been set out in the foregoing petition for writ of certiorari, and for the sake of brevity will not be restated here.

IV

STATEMENT OF FACTS

The facts of the case have already been set forth in the preceding petition for writ of certiorari under Questions Presented, and for the sake of brevity will not be restated here.

V

QUESTIONS AND ASSIGNMENT OF ERRORS

The questions involved and assignment of errors have been stated in the preceding petition for writ of certiorari, under Questions Presented, and for the sake of brevity will not be restated here.

VI

GROUNDS FOR JURISDICTION

The grounds for the jurisdiction of this Court are stated in the preceding petition for writ of certiorari, under Reasons for Allowance of Writ of Certiorari and for the sake of brevity will not be restated here.

ARGUMENT

POINTS TO BE CONSIDERED

POINT NO. I

THE ORDER OF THE COURT DATED SEPTEMBER 25, 1965, VOL. 7, PAGE 564, WHICH PROVIDES AS FOLLOWS:

> "IT APPEARING TO THE COURT THAT COMPLAINT, ORDER OF POSSESSION AND ORDER APPOINTING COMMISSIONERS HAVE BEEN ENTERED IN THE ABOVE STYLED CAUSE; IT IS HEREBY ORDERED, ADJUDGED and DECREED THAT THE COMMISSION REPORT ITS AWARD TO THE COURT OR TO THE CLERK OF THIS COURT WITHIN 3 MONTHS FROM DATE.
>
> SIGNED, WM. E. MILLER, UNITED STATES DISTRICT JUDGE."

IS IN VIOLATION OF SECTION 25, OF THE TENNESSEE VALLEY AUTHORITY ACT 16 U.S.C. p. 831X WHICH IS IN PART AS FOLLOWS:

> "EITHER OR BOTH PARTIES MAY FILE EXCEPTIONS TO THE AWARD OF THE COMMISSION WITHIN TWENTY DAYS FROM THE DATE OF FILING SAID AWARD IN COURT."

Said order is in conflict with the statute above quoted, for the reason that the Judge's order is that "the Commission report its award to the *Court* or to the *Clerk of this Court* within 3 months from date." conflicts with the statute which provides "May file exceptions to the award of the commission within twenty days from the date of filing said award in *Court*."

It is universal that a Rule must not contravene a statute or the organic law. As against conflicting statutory provisions such rules are without force. They must be subordinated to the law, and in case of conflict the law will prevail." American Jurisprudence Vol. 14, Courts, Paragraph 152. See The St. Lawrence (Meyer v. Tupper) 1 Black (U. S.) 511, 17 L. ed. 180.

There are several cases cited under American Jurisprudence 14, paragraph 152, which need not be quoted here. See *Sibbach* vs. *Wilson Co.*, 312 U. S. 1; 65 L. ed. 479; 61 S. C. 422. This case also held:

> "A court's power to prescribe rules of practice does not extend to the creation of a remedy in addition to that prescribed by the legislature."

In the case of *Universal Credit Co.* v. *Antonsen*, 374 Ill. 194, it was held:

> "The frailty of a statute cannot be remedied by a court's rule."
>
> See 130 A. L. R. 626; 158 A. L. R. 715.

In the case of *United States* vs. *Sherwood*, 312 U. S. 584; 85 L. ed. 1058; 61 SS. C. 7667, held:

> "An authority conferred upon a court to make Rules of procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction."

Then it must follow that the Court's rule in "filing with the Clerk of the Court" is an enlargement of the court's jurisdiction.

Many authorities can be cited to support the appellant's contention.

The reason for a statute is simply that orders and awards should be filed in court and that they should be presented to the plaintiff and defendant.

In the case at Bar Judge Miller's decision was sent to counsel of both the plaintiff and defendant and an order was drawn in accordance with his decision, prepared by the prevailing party and approved by the losing party, then counsel for each party knew of its filing and knew they had thirty days in which to appeal from the decision of the judge. Then it should follow that the filing of the award should have been made by order approved by both counsel, and we believe that this is the reason the statute provided filing in the court.

POINT NO. II

WHETHER THE LODGING OF THE AWARD BY THE COMMISSIONERS WITH THE CLERK OF THE COURT IS VOID AND IN VIOLATION OF SECTION 25, TENNESSEE VALLEY AUTHORITY ACT, 16 U. S. C. p. 831-X.

We deem the discussion under Question 1 should suffice for the question as they are so closely related.

POINT NO. III

WHETHER THE FEDERAL RULES OF CIVIL PROCEDURE, RULE 6(b) ENLARGEMENT AND 6(e) ADDITIONAL TIME AFTER SERVICE BY MAIL APPLIES TO THE CASE AT BAR.

Rule 1 of the Federal Rules of Civil Procedure provides that "These Rules govern the procedure in the District Court of the United States, with the exception stated in Rule 81." There is no exception on Rule 81 as to the Tennessee Valley Authority.

It is our considered opinion since the notice of the award was sent by mail the defendant had three days additional time under Rule 6(e), wherein said Rule provides:

> "Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period."

It is the contention of the appellant that Rule 6(e) is applicable and that the filing of appellant's exceptions to the award was within the prescribed time.

POINT NO. IV

DID THE AFFIDAVITS SUBMITTED BY DR. J. S. SKAGGS AND THE APPELLANT VADA SKAGGS SHOW EXCUSABLE NEGLECT?

The affidavits of the appellant and her husband showed their punctual exception to the award of the commission.

These affidavits speak for themselves and it is appellant's contention that they come within Rule 6(b) Enlargement and are part of the record.

POINT V

ARE THE STATUTES RELIED UPON IN THE CASES OF *ROBINSON* v. *CELEBREZZE*, 237 F. SUP. 113; AND *EWING* vs. *RISHER*. 176 F. 2d (10th. Cir. 1949) *PARI MATERIA* to SECTION 25 OF THE TENNESSEE VALLEY AUTHORITY ACT, 15 U. S. C. p. 831X, WHERE

THE SAID STATUTE PROVIDES "EITHER OR BOTH PARTIES MAY FILE EXCEPTIONS TO THE AWARD OF THE SAID COMMISSIONERS WITHIN 20 DAYS FROM THE DATE OF FILING SAID AWARD IN COURT."

We disagree with the Court's opinion that the limitation of 20 days is a part of the statute creating a cause of action and establishing jurisdiction in this Court.

The time limitation operates as a jurisdictional condition as distinct from the procedural limitation for the reason that limitation on appeal is thirty days. That is done by order of the Court, approved by the attorneys. The attorneys know the limitation and know that the appeal must be complied with in thirty days or they are out of court. But, in the case at Bar there was no order entered, no filing with the Court, just the mere lodging in the Clerk's office. This did not create a jurisdictional function because the statute further provides that after the twenty days the Court must hear the case *de novo* and then the losing party, if he so desire, has thirty days to file for appeal, which makes it a jurisdictional question which all courts will follow.

We call the Court's attention to the case cited referring to Paragraph 921 of Title 33 U.S.C. Review of Compensation Orders, which is as follows:

> (a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 919 of this title, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter."

Therefore, it should follow that we should examine the Tennessee Valley Authority, 16 U.S.C. 831X, which provides condemnation proceedings instituted by corporations, venue. and review.

The last paragraph of our Memorandum of March 19, 1965, District Court. is as follows:

> "It is to be noted that 831X covers two pages of the United States Code. At the bottom of page 390 U.S.C.A. 16, under 831X, the paragraph provides either or both parties may file exceptions to an order of said commissioners within twenty (20) days of filing of said award in Court. and also provides other things. However, the following paragraph provides for review within thirty (30) days from the filing of the decision of the district judge, etc. Then it would follow that the statute pertaining to T. V. A., U. S. C. A., 16 paragraph 831X, the fourth paragraph on page 391, which provides in part as follows:
>
> "At any time within thirty days from the filing of the decision of the District judges upon the hearing on exceptions to the award made by the commissioners, either party may appeal from such decision of the said judges to the court of appeals."

This statute is *pari materia* with the statute of Social Security 42 U.S.C. 405(g). and likewise the said statute is *pari materia* with the Compensation Statute 33 U.S.C. 921, because these statutes are for review by the district courts.

It is the universal rule that the period for appeal or review by district or appellate court is jurisdictional and when it is not done within the prescribed time it is fatal. See

Brainard vs. *Joy Manufacturing Company*, D. C. Ohio 1949—
—9 F.R.D. 625.

But the foregoing statutes are not *pari materia* with the T.V.A. statute 16 U.S.C. 831X, and fourth paragraph on page 390 and 391, which is as follows:

> "Either or both parties may file exceptions to the award of said commissioners within twenty days from the date of the filing of said award in court. Exceptions filed to such award shall be heard before three Federal district judges unless the parties, in writing, in person, or by their attorneys, stipulate that the exceptions may be heard before a lesser number of judges. On such hearing such judges shall pass *de novo* upon the proceedings had before the commissioners, may view the property, and may take additional evidence. Upon such hearings the said judges shall file their own award, fixing therein the value of the property sought to be condemned, regardless of the award previously made by the said commissioners."

This statute provides for filing exceptions to the award of said commissioners within twenty days from the filing of said award in court. Then the judge or judges in the Federal Court hears it *de novo* and may fix their own award; therefore, when and if the award of the commissioners is tried *de novo* by the district judge, then Federal Rule 6(e) is applicable to the commissioner's' award and thereby three (3) days are added to the time for filing.

POINT VI

ARE THE DECISION OF THE DISTRICT JUDGE AND U. S. COURT OF APPEALS FOR THE SIXTH CIRCUIT IN ACCORDANCE WITH THE SUPREME COURT OF THE UNITED STATES AS TO THE CONSTRUCTION OF THE FEDERAL RULES OF CIVIL PROCEDURE?

In the case of *Surowitz* vs. *Hilton Hotels Corp.*, 86 S. C. 845; 383 U. S. 363; 15 L. Ed. 2d 222; 83 S. C. 227, the Court held:

> "Basic purpose of federal rules is to administer justice through fair trials, not through summary dismissals."

We desire to call the Court's attention to the case of *Smith* vs. *Evening News Association*, 371 U. S. 195; 9 L. Ed. 2d. 246; 84 S. C. 267 under Syllabus 5. on page 267, the Court said:

> "The statute giving Federal District Courts jurisdiction of suits for violation of contract between employees and labor organization is not to be given a narrow reading."

Following case of *Foreman* vs. *Davis*. 371 U. S. 178; 9 L. Ed. 222; 83 S. C. 227; decided December 3, 1962, and we quote from the Court's decision on page 230 of 83 S. C. Paragraph 3, is as follows.

> "It is too late in the day and entirely contrary to the spirit of the Federal Rules and Civil Procedure for decisions on the merits to be avoided on the basis of mere technicalities. The Federal Rules reject the approach that pleading is a game of skill in which

one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to faciliate a proper decision on the merits; Consley v. Gibson, 355 U. S. 41, 48; 78 S. C. 99, 103; 2 L. Ed. 80. The Rules themselves provide that they are to be construed "to secure the just, speedy and inexpensive determination of every action," Rule I.

CONCLUSION

We contend that the United States District Court for the Middle District of Tennessee, Northeastern Division, did not have authority to enter an order in violation of the Statute to permit filing of an award with the clerk, when the statute provides filing with the court.

If the award was filed with the clerk it would not come under the Federal Rules of Civil Procedure, Rules 6(b) and 6(e), and that the Federal Rules of Civil Procedure as interpreted by this Court should be applied.

Respectfully submitted.

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APPENDIX

Filed Nov. 17, 1967. Carl W. Reuss, Clerk.

No. 17392

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

United States of America Upon the Relation and for the use of the Tennessee Valley Authority,
Plaintiff-Appellee,

v.

An Easement and Right-of-Way 100 Feet Wide and 747 Feet Long Over Certain Land in Cumberland County, Tennessee, Vada Skaggs,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Tennessee.

Decided November 17, 1967.

Before Phillips, Peck and McCree, Circuit Judges.

Phillips, Circuit Judge. This is a condemnation action initiated by the appellee under the Tennessee Valley Authority Act. 16 U.S.C. §§ 831-831dd, to acquire a permanent easement over certain property in Cumberland County, Tenn-

essee, for the construction, operation and maintenance of an electric power transmission line.

District Judge William E. Miller entered an order appointing commissioners to determine just compensation. The commission conducted hearings and filed an award for $150. Appellant thereafter filed exceptions to the award. A motion was filed by appellee to strike the exceptions on the ground that they were not filed within the twenty-day period prescribed by 16 U.S.C. § 831x. The District Court entered an order sustaining the motion and striking the exceptions. Appellant appeals from that order.

The TVA filed a motion to dismiss on the ground that the order of the District Court is interlocutory and is not a final appealable order. We consider the order to be final and appealable. Once the exceptions to the award of the Commissioners have been stricken, appellant has no further relief or recourse except to appeal. The entering of a judgment is simply a matter of formality. The requirement of finality is to be given a practical rather than a technical construction and does not necessarily mean that an order to be appealable must be the last possible one to be made in a case. *Gillespie* v. *United States Steep Corp.*, 379 U. S. 148; *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541. We consider this case to be distinguishable from an eminent domain action where, prior to a determination of damages, the landowner undertakes to appeal from a declaration of taking, which is not a final appealable order. *Catlin* v. *United States*, 324 U. S. 229; 28 U.S.C. § 1291.

Appellant also contends that the proceeding was void because the order of the District Court appointing the Commissioners directed that the Commissioners report their award

"to the court or to the clerk of this court," whereas Section 25 of the TVA Act, 16 U.S.C. § 831x, provides that "Either or both parties may file exceptions to the award of said Commissioners within twenty days from the date of filing of said award in court." Appellant contends that this provision of the statute requires that the award be filed with the District Judge and not with the clerk of the court.

We find this contention to be without merit and that the proper procedure was followed in filing the report with the clerk. The record shows that appellant's attorney in Crossville, Tennessee, received a copy of the report of the Commissioners on the day following the filing with the clerk of the District Court.

The award of the Commissioners was filed November 15, 1961. Appellant filed an exception to this award on December 6, 1961, alleging that the amount was insufficient and did not constitute just compensation. The exception was filed on the twenty-first day after the filing of the award. The District Judge sustained a motion by the TVA to strike the award on the ground that it was not timely, holding the twenty-day limit prescribed by the statute to be jurisdictional in nature.

Appellant contends that Rules 6(b) and 6(e), Fed. R. Civ. P., should be applied to make the filing of the exception timely. In the alternative, appellant asserts that the District Court should have held the statute to be satisfied since the exception was mailed to the clerk within the prescribed time. Specifically, appellant claims that since the award was sent to her lawyer by mail, she should have had three extra days to file an exception as provided in Rule 6(e). In any event appellant asserts that there was "excusable delay" as contemplated by Rule 6(b).

We hold this contention to be without merit for the reasons stated in the following language of the memorandum prepared by District Judge Miller, which we approve and adopt as a part of this opinion:

> "Since the time limitation of twenty days is a part of this statute creating the cause of action and establishing jurisdiction in this Court, the time limitaton operates as a jurisdictional condition as distinguished from a procedural limitation. See *Robinson* v. *Celebrezze*, 237 F. Supp. 115 (E.D. Tenn. 1964), and *Ewing* v. *Risher*, 176 F. 2d 641 (10th Cir. 1949). For this reason, Rule 6(e), relating to procedural time periods, has no application. Rule 6(e) is also unavailable to the defendant for quite another reason. The rule provides for extension of time in situations where a party is required to 'do some act or take some proceedings within a prescribed period after the service of a notice or other paper on him.' Under the section in question, however, a party is required to file an exception on the *filing* of the Commissioners' award. Although the Clerk may send a copy of the award by mail, the Rule clearly contemplates situations in which actual service is offered by mail.
>
> "Rule 6(b) is likewise not available to the defendant. In the first place, no sufficient cause for the delay has been shown as required by the Rule itself. Further, by its terms, Rule 6(b) applies to procedural steps to be taken 'by these rules or by a notice given thereunder or by order of court.' Here, the procedural step was not of that class but was set out in the statute creating the right of action.
>
> "Finally, defendant's contention that mailing of an exception constitutes filing is also without merit. The

act of depositing the exception in the mail is not a filing. A filing takes place only when the Clerk acquires custody. *Kahler-Ellis Company* v. *Ohio Turnpike Commission*, 225 F. 2d 922 (6th Cir. 1955). Likewise, defendant's contention that the word 'from' in the statute causes the first two days of the time period to be omitted is without merit."

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 943

VADA SKAGGS, PETITIONER

v.

UNITED STATES OF AMERICA, EX REL. TENNESSEE VALLEY AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Section 25 of the Tennessee Valley Authority Act, 16 U.S.C. 831x, provides that just compensation for property condemned by TVA shall be determined by commissioners appointed by the district court, and that

> Either or both parties may file exceptions to the award of said commissioners within twenty days from the date of the filing of said award in court.

On November 15, 1961, the commissioners appointed by the district court filed their award for a transmission

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line easement with the clerk of the court.[1] Notification of the filing of the commissioners' award was sent immediately by the clerk to counsel for petitioner and was received by him on the day following the filing. Petitioner did not file her exceptions to the award until December 6, 1961, 21 days after the award was filed.

The court below was correct in holding that the filing of the award with the clerk was "filing * * * in court" within the meaning of Section 25 of the TVA Act, 16 U.S.C. 831x;[2] that, since the 20-day period for filing exceptions to such an award is fixed by the statute itself rather than by court rule or order, it is a limitation not subject to enlargement by subsection (b) or (e) of Rule 6 of the Federal Rules of Civil Procedure;[3] and that exceptions filed more than 20 days after the filing of the commissioners' award accordingly were out of time.

In any event, Rule 6(b) permits *nunc pro tunc* enlargement after the specified time period has run only

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[1] This was in conformity with the court's direction that the commissioners report their award "to the Court or to the Clerk of this Court" within three months.

[2] See *In re Gubelman*, 10 F. 2d 926 (C.A. 2); *Kahler-Ellis Co.* v. *Ohio Turnpike Comm'n*, 225 F. 2d 922 (C.A. 6). See also Rule 5(e) of the Federal Rules of Civil Procedure; *Williams* v. *Todman*, 367 F. 2d 1009, 1012 (C.A. 3). Petitioner cites no authority for her contention to the contrary.

[3] *Matton Co.* v. *Murphy*, 319 U.S. 412; *George* v. *Victor Co.*, 293 U.S. 377; *United States* v. *Sherwood*, 312 U.S. 584; *Ewing* v. *Risher*, 176 F. 2d 641 (C.A. 10); *Schlink* v. *Chesapeake & O. Ry. Co.*, 276 F. 2d 116 (C.A. 6); *Robinson* v. *Celebrezze*, 237 F. Supp. 115 (E.D. Tenn.); *Army and Air Force Exchange Service* v. *Hanson*, 250 F. Supp. 857 (D. Hawaii); *Youngson* v. *Lusk*, 96 F. Supp. 285 (D. Neb.); *Lusk* v. *Lyon Metal Products*, 9 F.R.D. 250 (W.D. Mo.).

upon a showing that failure to file timely was the result of "excusable neglect." Here, however, the district court, in the exercise of its discretion, found "no sufficient cause for the delay * * *" (Pet. App. 24). Rule 6(e) provides an additional three days to take action when action must be taken after service, if the service is made by mail. The time for filing exceptions, however, is specified by the statute to run from the filing of the award, and not from service of notice of the award.

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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